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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 923

ALFRED AVINS,

Petitioner,

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, dated November 2, 1967, which affirmed the judgment of the United States District Court for the District of New Jersey, dated December 23, 1966, dismissing the petitioner's complaint.

OPINIONS BELOW

The opinions of the courts below are not yet reported. Copies of these opinions are set forth in the appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Is it a violation of the freedom of speech of a writer for a law review article for a tax-supported, state university law review to reject his article submitted to it for consideration for publication because of political or ideological disagreement with its contents?

2. Is it a violation of the guarantees of freedom of speech in Article 4, Section 2, and the 14th Amendment, to

the Constitution, for a state-supported law review to discriminate against a person submitting an article because of political or ideological disagreement with the article only?

3. Were the courts below in error in disposing of this case on summary judgment and in refusing to let petitioner show as a matter of fact that his article was rejected on ideological grounds, and that the articles editor of the law review was ideologically indoctrinated?

CONSTITUTIONAL PROVISIONS INVOLVED

(1) Article 4, Sec. 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

(2) Fourteenth Amendment: "No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 26, 1966, plaintiff submitted to the Rutgers Law Review, operated by defendant, Rutgers, The State University of New Jersey, and supported by tax funds, an article entitled "De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from The Civil Rights Act of 1875." The article dealt with the legislative history of the Fourteenth Amendment and concluded that this Court's decision in Brown v. Board of

Education, 347 U.S. 483 (1954), was in error in holding that the legislative history was inconclusive. On May 8, 1966, the articles editor of the law review rejected the article on the ground that "approaching the problem from the point of view of legislative history alone is insufficient." On May 12, 1966, plaintiff replied, pointing out that using legislative history was the "conservative" premise in constitutional law, while use of case-oriented and social-science oriented material was the "liberal" premise, which assumes that original intent may be rejected. On this basis, plaintiff remonstrated with the editor, but this remonstrance was rejected. When plaintiff's appeals to the Dean and Board of Governors brought no relief, this suit followed. It might be noted that

plaintiff's article was subsequently published in 38 Mississippi Law Journal 179 (March 1967). Meanwhile, in the same volume of the law review the articles editor published an article on the same subject by a well-known liberal lawyer, taking the opposite position from plaintiff's article. See Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers Law Review 387 (Spring 1967).

Plaintiff (now petitioner), a citizen of Tennessee, then filed suit in the United States District Court for the District of New Jersey, invoking jurisdiction under 28 U.S.C. §§1331, 1332, 1343, and 42 U.S.C. §1983. The key allegation of plaintiff's complaint was that "9. ... the Rutgers Law Review has a policy of only accepting articles reflecting a 'liberal' jurisprudential outlook in constitutional law,

which rejects the primacy of legislative history or original intent of the framers of a constitutional provision. Solely on the grounds that this article reflected a 'conservative' ideological or jurisprudential premise, on May 6, 1966, the Rutgers Law Review rejected and refused to publish the aforesaid article." Plaintiff's request for relief was as follows:

"Wherefore, plaintiff demands a declaratory judgment that defendant, in the operation of the Rutgers Law Review, cannot legally refuse articles because of the jurisprudential or ideological premises on which they are based, and further demands an injunction restraining defendant and all its agents from rejecting plaintiff's articles on ideological grounds."

Plaintiff served interrogatories on

defendant in order to gather evidence that defendant was ideologically indoctrinating its students, and that the article was rejected on ideological grounds. Both sides then moved for summary judgment. Plaintiff submitted evidence that political and ideological discrimination had occurred in a number of law schools and law reviews and charged that the instant rejection of his article was so motivated. Defendant and the law review editor denied that charge.

The district judge granted defendant's motion for summary judgment. He held that plaintiff's attempt to seek evidence of political and ideological discrimination was irrelevant, and expressed "serious doubt" that plaintiff's right to freedom of speech extended to a right against ideological discrimination

by a law review supported by tax funds. The district judge further found that it was unnecessary to decide whether such discrimination had in fact occurred, or whether the law review had a liberal ideological policy, and expressly did "not reach that question." Instead the district judge dismissed the complaint because he agreed with the law review editors that the reasons for rejecting the article were valid.

In its opinion affirming the district judge, the Third Circuit largely agreed with his reasoning. In substance and effect, the Court of Appeals held that a tax-supported state university law review had the right and discretion to reject articles if they disagreed with the ideological orientation of the article. The Court of Appeals also dismissed

plaintiff's allegation of ideological orientation as incredible without allowing plaintiff the opportunity of trying the matter.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Are Contrary to Principles Recognized by This Court and Other Lower Courts.

The uniform current of both state and federal cases, in this Court and below, is to the effect that it is a violation of freedom of speech for a tax-supported, public facility of any kind to discriminate among applicants for use of that facility based on disagreement with the political views of the speaker. In other words, if the facility is made available to persons of one political point of view, it must be made available

on similar terms to those of differing points of view. See Niemotko v. Maryland, 340 U.S. 268 (1951)(park); Association for the Preservation of Freedom of Choice v. Shapiro, 9 N.Y. 2d 376, 174 N.E. 2d 487 (1961)(incorporation); East Meadow Community Concerts Ass'n. v. Board of Education, 18 N.Y. 2d 129, 272 N.Y.S. 2d 341 (1966)(school); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S. 2d 924 (1962) (auditorium); Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963)(auditorium); Anderson v. Moses, 185 F. Supp. 727 (S.D. of N.Y. 1960)(restaurant); Kissinger v. New York Transit Authority, U.S. Dist. Ct., S.D. N.Y., 66 Civ. 836 (Bonsal, J.), New York Times, Sept. 13, 1967, p. 3, col. 6 (subway posters); Dickey v. Troy State College, U.S. Dist. Ct., M.D. Ala. (Johnson, J.), N.Y. Times, Sept. 9, 1967,

p. 25, col. 5. (college newspaper). The instant case is the only one in the country holding to the contrary.

The district court cited no authority to support its conclusion, and the Court of Appeals cited no case involving political discrimination in the use of a publicly-supported facility. In fact, that court relied chiefly on its own opinion in McIntire v. Wm. Penn Broadcasting Co., 151 F. 2d 597 (3rd Cir. 1945), which carefully distinguished between a private, albeit licensed, business, and a tax-supported publicly-owned facility. There is some thoughtful comment to the effect that even private communications media which enjoy a monopoly should not discriminate on ideological grounds. Barron, Access to the Press, A New First Amendment Right, 80 Harv. L. Rev. 1641

(1967). It is not necessary to go so far for this case. Suffice it to say that the instant case is unique in holding that a tax-supported facility has discretion to engage in political discrimination among potential contributors.

The Third Circuit apparently attempted to distinguish this case from other, prior cases, on the ground that a law review has discretion to decide what articles should be presented to the readers. This is a distinction without a difference. By a parity of reasoning, it could be held that a college has discretion to decide what articles should go into the school newspaper, that the New York City Transit Authority has discretion to decide what posters shall fill the spaces in public subways and busses, that public restaurant managers have discretion to decide what organizations

may occupy the restaurant for the evening, that managers of a school or other public auditorium have discretion to decide what groups shall be able to rent or use the auditorium to the exclusion of other groups, and so forth. In all of these cases discretion undoubtedly exists, but if it is exercised on political grounds then such exercise is unconstitutional. It is difficult to understand why a law review requires a different constitutional rule.

Since the instant case conflicts with established principles of constitutional law, set forth by this Court and by cases in all other courts, it is submitted that certiorari should be granted on this ground.

2. The Instant Case Raises Issues of Considerable Public Importance.

In Keyishian v. Board of Regents, 17 L. Ed. 629, 87 S.Ct. 675 (1967), this Court, in the latest of a long line of cases, expressed the determination to keep publicly-supported universities free from ideological conformity by any faction. This case subverts that principle entirely.

If one branch of a publicly-supported university can be seized by any ideological faction or viewpoint, then all can, and our tax-supported schools will soon become ideological fortresses repelling invasion of hostile ideas. The whole concept of free exchange of ideas and free inquiry will be eliminated.

Moreover, no sound basis exists for limiting this case to law schools. A similar discretion must exist in scholarly

journals devoted to all of the social and physical sciences. If ideological conformity can be imposed in one area by shutting out dissenting views from tax-supported publications, it can be imposed in every area. American universities will hardly differ from Russian or Chinese universities.

Most basic research, not only in law but in other branches of learning, is done by universities today, often with millions of dollars worth of tax money in the form of grants. Every cultured person is familiar with the disasters in Soviet agriculture which occurred because Trofim D. Lysenko was able to impose ideological conformity on Soviet university research in the field of genetics, and to drive out of Soviet universities the classic geneticists. See New York Times, Feb. 5,

1965, p. 1, col. 3, p. 4, col. 4; Oct. 17, 1967, p. 26, col. 1. This case differs in degree only, not in principle. Shutting out dissenting views always risks shutting out the more accurate views. Hence, the public importance of this case far transcends plaintiff's right to non-discriminatory treatment by a tax-supported facility, or the right to publish an article (which has been published elsewhere anyway).

In the final analysis, the courts below appeared to have decided this case because they disagreed with plaintiff's article. No doubt this Court will also disagree with it. But freedom of speech is indivisible, and if liberals can seize a university and shut out conservatives, then conservatives have an equal right to seize a public university and shut out liberals. Whatever kind of discrimination

is permissible in New Jersey is also permissible in Mississippi. The Constitution is exactly the same all over the country. This is exactly the precedent created below and it is submitted that it is a dangerous precedent which far transcends the importance of this case.

3. The Factual Claim of Ideological Indoctrination Has Not Been Fairly Dealt With.

In response to the denial by the law review editor of plaintiff's charge that the editor had been ideologically so indoctrinated as to be incapable of understanding fully that this was the basis for his decision. The district court found it unnecessary to decide this question of disputed fact, but the Court of Appeals rejected this claim out of hand as "so frivolous as to require no discussion."

Other circuits have held that summary judgment cannot be granted based upon facts peculiarly within the knowledge of the moving party. Cellini v. Moss, 232 F. 2d 371 (C.A.D.C. 1956); Alvado v. General Motors Corp., 229 F. 2d 408, 411-2 (2d Cir. 1955); Sabin v. Goldsmith, 224 F. 2d 753, 758-761 (2d Cir. 1955). And it has also been held that a party's entitled to try his factual allegation's, even if they seem incredible to a judge. Arnstein v. Porter, 154 F. 2d 464, 469-471 (2d Cir. 1946).

If disputed factual claims can be dismissed out of hand without trial because the judge thinks they are "frivolous" or "ridiculous" then a party can be denied his day in court based on a judge's preconceived notions. This manner of handling factual disputes is so manifestly unfair

and at variance with the normal mode of judicial procedure as to warrant intervention by this Court. Judicial notice cannot be taken of whether one particular student has been indoctrinated by one particular professor, and any attempt to do so is not a proper way of disposing of factual questions.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 16480

ALFRED AVINS,

Appellant

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY

Appeal from the United States District for the District of New Jersey

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Argued October 2, 1967

Before: STALEY, Chief Judge, and MARIS and VAN DUSEN, Circuit Judges.

OPINION OF THE COURT

(Filed November 2, 1967)

By MARIS, Circuit Judge.

The plaintiff, Alfred Avins, brought suit in the District Court for the District of New Jersey against the defendant, Rutgers, The State University of New Jersey, for declaratory and injunctive relief. The plaintiff alleged that he had submitted to the editors of the

Rutgers Law Review for publication in the Review an article which reviewed the legislative history of the Civil Rights Act of 1875 as it pertained to school desegration and which concluded that, in the light shed by the Congressional debates, the United States Supreme Court had erred in Brown v. Board of Education, 1954, 347 U.S. 483, 489, in holding that "although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive." The articles editor of the Review had rejected the article, stating in his letter of rejection "that approaching the problem from the point of view of legislative history alone is insufficient." The plaintiff asserted that the editors of the Law Review had adopted a discriminatory policy of accepting only articles reflecting a "liberal" jurisprudential outlook in constitutional law, an outlook which, he said, rejects the primacy of legislative history and the original intent of the framers of a constitutional provision. The plaintiff stated that his article represented the "conservative" approach to constitutional law and he contended that its rejection, which he said was solely because of its conservative tenor, violated his constitutional right to freedom of speech. Both the plaintiff and the defendant moved for summary judgment. After hearing, the trial judge, in an oral opinion, stated, inter alia, that he had "serious doubt as to whether the right of freedom of speech embraces a privilege to use a law school review publication as a medium. Freedom of speech is guaranteed

by the Constitution, but the right to have others listen is not guaranteed, nor is anyone obligated to read articles that an author is able to publish. It could not be contended reasonably that the Editorial Board of Rutgers Law Review must accept for publication every treatise on law which is submitted to it. There must necessarily be a broad area for the exercise of discretion." The judge concluded that the plaintiff had not shown that he had been deprived of a federally protected right. Summary judgment was accordingly entered for the defendant and this appeal by the plaintiff followed.

The plaintiff's basic contention on this appeal is that a law review published by a state-supported university, such as the defendant, is a public instrumentality in the columns of which all must be allowed to present their ideas, the editors being without discretion to reject an article because in their judgment its nature or ideological approach is not suitable for publication. In considering this contention it must be borne in mind that the validity of a restraint on speech in each case depends on the particular circumstances. Speiser v. Randall, 1958, 357 U.S. 513, 521. It is essential, therefore, to scrutinize the procedure by which it is claimed that Rutgers, as an instrumentality of the State of New Jersey, has restrained that freedom. For "Differences in circumstances beget appropriate differences in law." Whitney v. State Tax Commission, 1940, 309 U.S. 530, 542. As Justice Black remarked in his concurring opinion in Cox v. Louisiana, 1965, 379 U.S. 559, 578:

"The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly, where people have a right to be for such purposes."

Our inquiry, therefore, is whether in the setting of this case the refusal of the editors of the Rutgers Law Review to permit the review to be the medium for the expression of the plaintiff's ideas abridged his right of free speech. It appears that the publication is part of the educational program of the Law School of Rutgers University for its law students, that the editorial work is done by law students under general faculty guidance, and that the material published consists of "lead" articles contributed by outside authors, in addition to students' writing. The plaintiff does not assert that the operations of the Rutgers Law Review, or the work of the student editors, deviates in any way from that which is customarily followed in the publication of similar law reviews by non-public law schools. Traditionally, a law review is student edited and the student editors determine the policies and decide which of the submitted articles and other material are to be published. In this regard, the trial judge stated:

> "...the Editorial Board must be selective in what it publishes, and a selective process requires the exercise of opinion as to what particular subject matter of the

> law will at a given time be of educational value, not only to the student body, but also to the subscribers.
>
> "The plaintiff in this case seems to feel that the subject matter of his article is of paramount significance and should be published to the exclusion of other articles that were apparently selected to fill the space that this article would have taken in the Law Review.
>
> "In this respect he seeks to intrude his opinion upon that of the Editorial Board..."

The trial judge found as a fact "that the reasons for rejection as stated by Mr. Calligaro [the student articles editor] were valid and that this particular article was one which it would not be unreasonable for any editorial review board of a Law Review to reject."

We agree. The right of freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. On the contrary, each particular avenue for expression presents its own peculiar problems. Joseph Burstyn, Inc. v. Wilson, 1952, 343 U.S. 495, 502-503. Nor does freedom of speech comprehend the right to speak on any subject at any time. American Communications Assn. v. Douds, 1950, 339 U.S. 383, 394. As this court said in McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 1945, 151 F.2d 597, 600-601,

cert. den. 327 U.S. 779, "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum." See, also, Earle C. Anthony, Inc. v. Morrison, D.C.Cal. 1948, 83 F.Supp. 494, aff. 9 Cir. 1949, 173 F.2d 897, cert. den. 338 U.S. 819; Tribune Review Publishing Company v. Thomas, 3 Cir. 1958, 254 F.2d 883.

Thus, one who claims that his constitutional right to freedom of speech has been abridged must show that he has a right to use the particular medium through which he seeks to speak. This the plaintiff has wholly failed to do. He says that he has published articles in other law reviews and will sooner or later be able to publish in a law review the article here involved. This is doubtless true. Also, no one doubts that he may freely at his own expense print his article and distribute it to all who wish to read it. However, he does not have the right, constitutional or otherwise, to commander the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey tax-payers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this

is in no wise lessened by the fact that the law review is supported, at least in part, by the State.

The plaintiff's contention that the student editors of the Rutgers Law Review have been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate his article objectively is so frivolous as to require no discussion.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

ORAL OPINION

THE COURT: This is a civil action wherein plaintiff, a professor teaching at Memphis State University, seeks a declaratory judgment and a restraining order.

He alleges that the defendant has violated and continues to violate rights secured to him by Article IV, Section 2 of the United States Constitution, made applicable to the states by the Fourteenth Amendment.

The defendant moves for dismissal of the complaint under Rule 12(b). Subsequently defendant moved for judgment under Rule 56(c), and plaintiff filed a cross motion for judgment.

During the course of the hearing here the Court posed the question to counsel as to whether each considered the factual record before the Court sufficiently complete for the Court to render judgment on the facts set forth in the record. Plaintiff agreed with one qualification. He said that he would submit provided the Court reached the opinion that certain interrogatories not answered by defendant were irrelevant. The first of those interrogatories reads as follows: "Please state the historical material examined by Mr. Calligaro as of May 6, 1966, on which he based this opinion." The opinion to which the

interrogatory refers is the one set forth in the letter of Mr. Calligaro stating his reasons why the article of the defendant was not approved for publication. That interrogatory is answered by defendant: "Not known to defendant."

The second interrogatory reads: "Please state any additional materials he examined after May 6, 1966, if any there was, to reinforce this conclusion with as much specificity as his recollection will admit of." This was answered: "Not known to the defendant."

Parenthetically I might state that these interrogatories were answered on behalf of the defendant by John G. Graham, attorney for the defendant, Rutgers State University of New Jersey.

Plaintiff proceeded with further interrogatories. No. 2 reads: "If Mr. Calligaro has studied constitutional law please state: (A) School or schools at which he studied constitutional law; (B) Teacher or teachers under whom he studied constitutional law; (C) Textbooks and case books he used in such course or courses, or other material so used." That question has been answered.

The third question reads, Subsection A, "Does Mr. Calligaro's belief or state of mind as reflected in this statement extend to the Legislative history of the Fourteenth Amendment as it applies to segregation other than school segregation?" The answer is: "Not known to defendant."

Subsection B reads: "If the answer to (a) above is 'Yes,' does it extend to segregation in transportation?" There again the answer was: "Not known to the defendant."

Subsection C reads: "If the answer to (a) above is 'Yes,' does it extend to segregation in places of public accommodation generally?" The answer is: "Not known to the defendant."

Subsection D: "Does Mr. Calligaro's belief or state of mind, as reflected in statement 3 above, apply to any problem in which the United States Supreme Court has made a determination that the Legislative history of the Fourteenth Amendment does not furnish a guide to the interpretation of that amendment?" The answer is: "Not known to defendant."

Interrogatories 5, 6, 7 and 8 are answered: "Not known to the defendant."

Interrogatory 9 reads: "Who makes the editorial policy of the Rutgers Law Review?" And the answer is: "The Board of Editors."

Interrogatory 10 reads: "State whether Mr. Calligaro played any part in making the editorial policy of the Rutgers Law Review, and if so, what part?" The answer is: "Yes. As articles editor, Mr. Calligaro contributes his knowledge and opinion to the Board of Editors, of which he is a member, to aid in the decision-making process."

First I reach the conclusion that the information sought by Interrogatory No. 1 is not relevant.

As I mentioned, Interrogatory No. 2 was answered.

I do not consider the question propounded in Interrogatory No. 3 as proper, and the same opinion applies to Interrogatories Nos. 4, 5, 6, 7 and 8.

I might note here at this point that the defendant has conceded that he does not challenge the good faith of the statement by the editor in rejecting his article and concedes for present purposes that the statement is credible, and qualifies the concession by suggesting that notions were injected into the mind of the editor which made it impossible for him to be capable of objective thinking.

I am going to consider this matter now first from the standpoint of the merits of the motion for judgment, and I would also consider, in view of the submission of the case to the Court, further findings of fact on the merits.

In support of the motion for judgment the defendant has filed the affidavit of Lee Calligaro, articles editor of the Rutgers Law Review, and plaintiff appearing pro se has filed an affidavit in support of the cross motion for judgment together with answers of the defendant to the interrogatories propounded by plaintiff.

Article IV, Section 2 of the United States Constitution provides in pertinent part that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.

The Fourteenth Amendment provides in pertinent part that no state shall make or enforce any law which shall abridge the privileges of citizens of the United States.

Parenthetically it may be noted that in the original complaint filed plaintiff not only alleged violation of constitutional rights secured by the Federal Constitution but also a violation of state law, "Constituting the operation of an ideologically partisan journal in violation of the state statutes."

Subsequently plaintiff amended his complaint by striking out this allegation. This eliminated any further arguable contention that the doctrine of abstention should apply.

It is difficult to grasp from the allegations of plaintiff's complaint the precise privilege of which he has been denied under Article IV, Section 2 of the Federal Constitution, or by virtue of the provisions of the Fourteenth Amendment.

Conceivably he contends that by operation of the Fourteenth Amendment his first amendment right to freedom of speech has been violated.

The basic facts upon which he predicates an alleged violation of a constitutional right is the refusal by the defendant to publish an article he had written for Rutgers Law Review. The precise questions presented on the record before the Court on the motion for judgment are whether there is a claim of a Federal constitutional right which is substantial and not frivolous, and if so, whether upon the record before the Court there is a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The defendant challenges subject matter jurisdiction. If plaintiff's claim as asserted raises a substantial question of whether defendant has "under color" of any state authority deprived him of a privilege secured by the Constitution of the United States the Court had jurisdiction, 28 United States Code, Section 1343(3). The amount in controversy as required by 28 U.S.C. 1331 and Section 1332 is not material. Adams v. City of Park Ridge, 293 F.2d 585 (Seventh Circuit, 1961), but the claim of violation of a Federal constitutional civil right must be substantial and not frivolous.

Therefore the existence of jurisdiction must be determined upon the nature of the alleged violation of a constitutional right that plaintiff asserts. The privilege of freedom of speech is secured by the Constitution which prohibits Congress from making any law abridging freedom of speech. The Fourteenth Amendment extends the prohibition to the states.

Plaintiff is a citizen of the State of Tennessee. Defendant is the New Jersey State University, whose educational facilities are financed by the legislative appropriation of public funds. Among its other educational departments it maintains a school of law which publishes the Rutgers Law Review.

Plaintiff submitted an article for publication entitled "De Facto and De Jure School Segregation: some reflected light on the Fourteenth Amendment from the Civil Rights Act of 1875." In that article plaintiff sought to express through the medium of the Rutgers Law Review his contention that the United States Supreme Court in construing the Fourteenth Amendment to the Constitution had departed from the intent and purpose of the amendment as conceived by those who framed it, and that as a consequence a broad and unjustifiable application had been written into constitutional law by judicial fiat. He relies in his article very heavily upon the history of legislative debate preceding the adoption of the Civil Rights Act of 1875.

In paragraph 7 of his complaint plaintiff summarizes the purport of the article he submitted in the following language: "The aforesaid article followed the 'conservative' jurisprudential approach to constitutional law, that use of legislative history was the only proper way of interpreting a constitutional provision, and based on this premise examined the legislative history of the Civil Rights Act of 1875 for the reflected light it cast on the intent of the framers of the Fourteenth Amendment.

The article concluded that the legislative history showed that the framers did not intend to forbid either de jure or de facto school segregation."

The introduction to plaintiff's article reads: "More than ten years after Brown v. Board of Education race relations and schools are still very much in the news. The continuing number of cases on de facto and de jure school segregation has continued public interest in this area. A review of the original understanding of the framers of the Fourteenth Amendment as applied to school segregation is clearly appropriate at this time.

"Ten years ago an article reviewing the original intent as reflected in the debates on the Fourteenth Amendment itself concluded that direct light on the subject was quite scanty. However, there is abundant reflected light from the debates on the proposed school clause of the bill which ultimately became the Civil Rights Act of 1875. The fact that the school clause was ultimately stricken from the bill has no doubt discouraged research in this area. Yet the debates thereon are illuminating for the reflected light they cast on the intent on the Fourteenth Amendment as it relates to schools. This article will analyze that debate."

I have just as I indicated a moment ago quoted in full the introductory paragraphs to the article. Following the introductory paragraphs the legislative history of the debate preceding the adoption of the Civil Rights Act of 1875

is reviewed, and in conclusion the following is stated by the plaintiff in his article: "The conclusion is inevitable. The rule of Brown v. Board of Education is not now, nor has it ever been, the supreme law of the land. Rather, it is an unwarranted exercise of nonexistent authority which, being illegitimate in its origin, cannot be made legitimate by the lapse of time, nor by compliance, voluntary, purchased, or coerced. As for so-called 'de facto' segregation, to believe that the Fourteenth Amendment mandates elimination of this requires a complete hallucination."

The Court cannot refrain at this point from commenting upon what it conceives to be the very intemperate language of the passage just quoted. Mr. Calligaro, articles editor for the Rutgers Law Review, returned the article to plaintiff stating: "It is our feeling that approaching the problem from the point of view of legislative history alone is insufficient. Most of the material you have presented here was before the court in Brown, and, as the court pointed out 'although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best they are inconclusive.' 347 U.S. 483, 489.

"I want to make it very clear that we are not rejecting this article merely because of the conclusion it reaches. We would be happy to consider an article taking a pro-segregation position, but feel that such an article would have to present

a more comprehensible and original analysis of the legal rationale for limiting or rejecting the Brown rule."

It was this refusal that prompted the litigation that plaintiff initiated here.

He states in paragraph 9 of his complaint that "On information and belief, the Rutgers Law Review has a policy of only accepting articles reflecting a 'liberal' jurisprudential outlook in constitutional law, which rejects the primacy of legislative history or original intent of the framers of a constitutional provision. Solely on the grounds that this article reflected a 'conservative' ideological or jurisprudential premise, on May 6, 1966, the Rutgers Law Review rejected and refused to publish the aforesaid article."

I make note of the fact that during the course of argument the defendant did not challenge the good faith of Mr. Calligaro in making the statement that he did in rejecting the article. He does indirectly attack the reasoning of Mr. Calligaro by substituting his own opinion as to what he believes the policy of Rutgers Law Review is.

The defendant as a state institution supported by public funds may not adopt a discriminatory policy and by the application of it deny equal access to the use of its educational facilities.

A discriminatory policy would be one which distinguished between persons on the

basis of race, color or creed. See McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950). Compare State of Pennsylvania and others against trustees of the Estate of Stephen Girard, not as yet officially reported, to my knowledge, District Court of Pennsylvania, 1966.

In this case plaintiff does not seek access to the use of the educational facilities of the law school. Stripped of all the excess verbiage of argument, his claim in substance is that he has a right to have his views as to what the law ought to be published in the Rutgers Law Review.

Now, it may be arguable that if there was a prevailing policy by regulation or otherwise which systematically discriminated against plaintiff or those of like mind to have their articles published in the Rutgers Law Review such regulation or policy could be questioned. The Court finds, however, that it is not necessary in this particular case to deal with that question, and it does not reach that question.

Moreover, the Court has serious doubt as to whether the right of freedom of speech embraces a privilege to use a law school review publication as a medium. Freedom of speech is guaranteed by the Constitution, but the right to have others listen is not guaranteed, nor is anyone obligated to read articles that an author is able to publish. It could not be contended reasonably that the Editorial Board

of Rutgers Law Review must accept for publication every treatise on law which is submitted to it. There must necessarily be a broad area for the exercise of discretion.

This is particularly true because of the purpose which a law review serves. Obviously the Editorial Board must be selective in what it publishes, and a selective process requires the exercise of opinion as to what particular subject matter of the law will at a given time be of educational value, not only to the student body, but also to the subscribers.

The plaintiff in this case seems to feel that the subject matter of his article is of paramount significance and should be published to the exclusion of other articles that were apparently selected to fill the space that this article would have taken in the Law Review.

In this respect he seeks to intrude his opinion upon that of the Editorial Board. Further, it should be mentioned in connection with the exercise of discretion that there are limitations of space and finance.

The Court read the article that was rejected. It is a very lengthy article. It would not be appropriate for the Court to express any opinion as to the merits of the subject matter, but the Court did find that there could be reasonable differences of opinion as to whether the

publication of this article would be of such educational value in the light of all that has gone before it so that it could be said that the rejection of it on the grounds stated by the defendant would permit an inference of a discriminatory practice violating a federally secured civil right.

After careful consideration of the entire record before the Court, the briefs submitted and the oral argument of counsel, the Court is of the opinion that it has not been shown that there has been a denial of any substantial civil right for which plaintiff is entitled to redress.

The Court reaches that conclusion with respect to the motion of plaintiff and the cross motion of defendant. It also reaches the conclusion by way of finding of fact that the reasons for rejection as stated by Mr. Calligaro were valid and that this particular article was one which it would not be unreasonable for any editorial review board of a Law Review to reject.

The motion of defendant for judgment will be granted with prejudice and without costs, and the motion of plaintiff for judgment will be denied with prejudice and without costs.

Judgment will be entered in this case in favor of the defendant and against plaintiff with prejudice and without costs. The Court will prepare and enter the appropriate order for judgment.

Oral opinion delivered by Hon. Robert Shaw, U.S.D.J. December 21, 1966, Newark, New Jersey

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ORDER FILED DECEMBER 23, 1966

It is on this 23rd day of December, 1966 ORDERED that judgment be and the same hereby is entered in favor of defendant and against plaintiff with prejudice and without costs.

s/ Robert Shaw
ROBERT SHAW
U.S.D.J.